FIDIC Standard Forms of Contracts or National Contracts in Public Investment

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Abstract

FIDIC standardized models have been the basis for international contracts specific to large-scale construction and installation works carried out mainly in the field of public investment. They have been a source of inspiration for national standard contracts which have gradually come to be used in the public works contracting process. With the appearance in 1959 of the first bilateral investment treaty[2], FIDIC investor protection clauses began to be harmonized with existing international investment treatment standards in the body of investment treaties, as any type of investment is based on a contract concluded on the basis of the pre-existence of a protection and promotion treaty.

Keywords: *FIDIC, engineer, supervisor, international investment, claim, arbitration, national contract.*

JEL Classification: K11, K23, K33.

1. Introduction

In general, the use of standardized forms of contract that are generally known or accepted by the contracting parties, whether they are entrepreneurs or beneficiaries of services in the field of public investment projects, will inherently lead to a substantial reduction in the risks posed by the fulfillment of contractual obligations, as well as the reduction of the costs of the parties related to the process of preparation, negotiation, conclusion and implementation of contracts[3].

At the same time, the use of international standards by the calque method, without a sound and realistic reference to national legislation, on the one hand, and to real field conditions, on the other hand, can lead to resounding failures in the signing/completion process of major investment projects, even if only as a result of different cultural understanding by the parties involved, in good faith on the part of all.

Understanding the culture, conception and national legislative approach, with specific differences, of the parties involved in the international contracting process of large-scale projects can be an important advantage in the contract negotiation process[4], as well as in the implementation of the contract.

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[2] According to official statistics, the oldest known BIT (Bilateral Investment Treaty) is the one between Germany and Pakistan signed on November 25, 1959.

[3] https://www.gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-1-10-01-2018&page=1, consulted on 1.09.2020.

[4] Robert Knutson, *FIDIC, An Analysis of International Construction Contracts*, Kluwer Law International and International Bar Association, 2005, p. xi.

2. FIDIC in short

FIDIC contracts represent standard contracts specific to construction and installation works. They are used as international models, enjoying the widest global recognition and, as a result, being the most common form of standard construction contracts. As a result, any international contractor or consultant in the field will face such contracts in its activity.

Although perhaps less known, the FIDIC contracts can be said to represent the correspondent of the INCOTERMS conditions in the commercial matter, which they preceded as appearance.

The purpose of FIDIC[5] contracts was to achieve contract standards that could be used as guiding ideas in the activity of constructions and installations in the conditions in which such works have the same elements and technical characteristics worldwide. The interest was represented by the desire to help and protect, in an equidistant and balanced way, the interests of all parties involved[6].

Romania first adopted these standards through Government Emergency Ordinance no. 34/2006[7] which subsequently underwent changes and ended up being repealed. However, they have been sources of inspiration for infrastructure works contracts since the 1990s[8], being imposed by foreign financiers who wanted to give an international scope to contracts concluded by the Romanian state, thus attracting foreign builders.

The best known and used standard models are FIDIC "red", FIDIC "yellow" and FIDIC "green"[9]. All contracts have common elements (general conditions) such as: the rights and obligations of the parties; method of payment; how to resolve disputes. At the same time, they contain specific elements (particular conditions) for each type of contract, respectively: language and law applicable to the contract, name of the person or company that will act as engineer or representative of the beneficiary/employer, score applied. The contracts also contain standard forms or documents that would be used in the procurement process.

A summary of the main types of FIDIC contracts is as follows:

Contract type	Year of publication	Specifications
Red	1957 amended	These contract models targeted the civil engineering

[5] Were created by the International Federation of Consulting Engineers (*Fédération Internationale Des Ingénieurs-Conseils*) which was founded in 1913 at the initiative of three European states (Belgium, France and Switzerland). Great Britain joined in 1949. Today, over 100 states are represented in the organization based in Geneva, Switzerland.

[6] https://www.proiect-contaplus.ro/blog/426-ce-sunt-contractele-fidic-si-de-ce-ar-trebui-folosite-in-domeniul-constructiilor-2, consulted on 1.09.2020.

[7] Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts.

[8] The methodological norm regarding the framework content of the projects - by design phases - of the tender documents, of the offers and of the contracts for the execution of the investments from 09.09.1996: art. 3.28: "the possibility to determine the weighting coefficients that intervene in the application of the polynomial formula (FIDIC type) for updating the value of the payment situations related to the construction-assembly activity, during the execution of the contracted works".

[9] The name comes from the color of the document cover at the time of publication of the first standard contract in 1957, respectively the color red.

(first form)	several times until 1996[10]	sector. The employer acted through its engineer who had to act impartially when making a decision or action that could affect the rights and obligations of the parties[11].
Yellow (first form)	1967 amended three times until 1987	Specific to the mechanical and electrical engineering sector (not covered by the Red contract)
Orange	1995	Contract in which the contractor is responsible for design, construction and turnkey delivery (Conditions of Contract for Design-Build and Turnkey). The Beneficiary's representative has a duty to act fairly, reasonably and in accordance with the contract in determining the value, costs and extensions of time limits.
The new Red contract	1999 amended in 2017[12]	Contract Conditions for building constructions and engineering works designed by the Beneficiary; its legal concepts are based on the Common Law system (Chapter 3)[13]; execution starts after the complete completion of the design; it contains the specifications and drawings of the project, the lists of quantities as well as the execution schedule. The price is fixed (unit) for real quantities of work performed starting from estimated quantities. Following an amendment by the World Bank, disputes are to be resolved by a Dispute Adjudication Board (DAB), consisting of one or three members appointed jointly by the Beneficiary and the Contractor at the commencement of the contract and paid by both parties.
The new Yellow contract	1999 amended in 2017	Contract Conditions for electrical and mechanical equipment and for buildings and engineering works designed by the Contractor. Also known as Plant and Design-Build contract[14]. Contains the employer's requirements and the timetable. The price is fixed (lump sum). In practice, design and execution go hand in hand.
Silver	1999	Model specific to turnkey projects. Most of the risks lie with the contractor who is responsible for the design. Payment is based on a lump sum.
Pink	2005 amended in 2006/2010	Created for the use of projects involving Development and Investment Banks or for projects financed by banks in general. Represents a variation of the Red Card contract

[10] https://www.thenbs.com/knowledge/a-brief-introduction-to-fidic-contracts, consulted on 1.09.2020.
[11] J. Glover, *FIDIC: An Overview. The Latest Developments, Comparisons, Claims and Force Majeure*, Construction law summer school 2007, Queen's College Cambridge, p. 2.
[12] https://fidic.org/bookshop, consulted on 1.09.2020.
[13] Nael G. Bunni, *The FIDIC Forms of Contract*, third edition, Blackwell Publishing Ltd., 2005, p. 15.
[14]https://www.international-arbitration-attorney.com/ro/fidic-contracts-overview-of-the-fidic-suite/, consulted on 1.09.2020.

Gold	2008	Specific to design-build and operation/maintenance contracts that extend over long periods of time (decades)
Blue	2006	Designed for projects that include dredging and recovery works as well as ancillary constructions.
White	2017 (latest version)	Hiring of consultants by employers or the Client/ Consultant Service Model Agreement, respectively the Sub-Consulting Agreement
Green	1999	Short form in which the employer provides the project; small ($ 500,000) or short (6 months), possibly repetitive.

The type of FIDIC Contract (most commonly used red and yellow FIDIC[15] respectively) to be chosen by the parties, respectively Employer/Beneficiary and Entrepreneur depends on the experience, purpose[16] and needs of each project, as well as the assumption of responsibility as regards the design and clear determination of the price to be paid. In general, decision-makers in public office do not want to assume price uncertainty for financial and political reasons, preferring to set flat prices[17].

However, specific to all the above-mentioned contracts are the principles: good faith, responsibility of all parties involved, a balanced approach between the parties and equidistant risk management. It should be noted that the principle found in many national laws (especially in the common law system) according to which the person interpreting the contract must take into account the literal meaning of the words must always be taken into account[18].

At the same time, it also should be noted that, although FIDIC contracts can be used by any country, regardless of whether its legal system is a specific common law or civil law system, the parties must verify that the provisions contained in the national legislation. In Australia, FIDIC formulas needed to be harmonized with relevant Payment Security legislation[19].

Due to the complexity of projects using FIDIC models, all parties must have relevant experience and qualified staff, which is the recipe for the success of such large works contracts. Last but not least, the Engineer as an agent of the employer[20] and the person who manages the construction project must have a good qualification in the field and be balanced. Under Red and Yellow FIDIC, the Contractor has the right to object to

[15]https://www.santiereonline.ro/app/projects/details/Drum-Expres-Craiova-Pitesti-Tronsonul-2-LOT1-Dolj-P242576, consulted on 1.09.2020.

[16] The Romanian authorities preferred Fidic for most of the infrastructure projects signed in 2018-2020. According to the statement of Prime Minister Ludovic Orban from 18.09.2020: "We are also in the process of bidding for the signing of the contract for the feasibility study and the technical project, we have chosen another type of FIDIC, so as to speed up the procedures.", https://gov.ro/ro/stiri/participarea-premierului-ludovic-orban-la-deschiderea-traficului-rutier-pe-sectoarele-de-autostrada-a3-sector-iernut-chetani-17-9-km-i-nodul-chetani-1-3-km-alaturi-de-ministrul-transporturilor-lucian-bode, consulted on 1.09.2020.

[17] Tunay Köksal, *FIDIC Conditions of Contract as A Model for An International Construction Contract*, „International Journal of Humanities and Social Science", vol. 1 no. 8, July 2011, p. 152.

[18] Robert Knutson, *FIDIC, An Analisys of International Construction Contracts*, Kluwer Law International and Internațional Bar Association, 2005, p. 40.

[19] Toby Shnookal, Donald Charrett, *Standard Form Contracting; The Role for FIDIC Contracts Domestically and Internationally,* in Society of Construction Law Conference, 2010, p. 23.

[20] Tunay Köksal, *op. cit.*, p. 150.

the Beneficiary's intention to replace the Engineer with a person to whom the Contractor raises reasonable objections by sending a detailed and justified notice to the Beneficiary[21]. Among the objections that can be invoked are those regarding the experience of the person proposed to replace the current Engineer, as well as regarding the authority necessary to administer the contract and supervise the entire project so as to achieve its established purpose.

At the same time, provided that the Beneficiary will request the Contractor to perform certain works at a certain agreed price (which may be a unit or flat rate) and within a period of time well determined by FIDIC contract, the Contractor will also have the right to request money, respectively additional time, from the Beneficiary, under certain well-established conditions, based on the same contract.

For example, in the case of FIDIC Red, the Contractor's remuneration is based on the principle of reviewing the payment starting from the list of quantities (Bill of Quantities) initially provided which serves as a starting point for the final revaluation and payment, but only if they are certified by the Engineer (Chapter 6)[22].

It should be noted that FIDIC standards establish a comprehensive dispute settlement mechanism. Thus, in addition to establishing the exact conditions under which the Contractor may request Claims (defined debt rights), the FIDIC models also provide for strict procedures for settling these rights[23]. The claims to which the Contractor is entitled may be:

- of a contractual nature: results from the contractual provisions[24];

- of a legal nature: claims that the Contractor may claim in accordance with the law governing the contract, respectively in case of breach of contract[25].

Depending on the type of FIDIC contract, the settlement of disputes has the following subsequent steps:

1. Presenting the case to an Engineer who will make a decision;

2. If the Contractor is dissatisfied with the Engineer's decision, he may subsequently refer it to a Dispute Resolution Commission ('DAB') in accordance with the provisions of FIDIC[26]. Thus, the Engineer's decision may be reviewed by a Dispute Settlement/Independent Dispute Settlement Commission consisting of one or three members appointed jointly by the Beneficiary and the Contractor at the commencement of the contract. As an example, we remind you that the World Bank sets certain conditions that must be met for any project financed by it, including the fact that this DAB commission must consist of three members for projects over 50 million US

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[21] Ellis Baker, Ben Mellors, Scott Chalmers, Anthony Lavers, *FIDIC Contracts, Law and Practice*, Ed. Informa Law from Routledge, 2009, p. 274.

[22] Nael G. Bunni, *op. cit.*, 2005, p. 15.

[23] Christopher R. Seppälä, *Contractor's Claims Under the FIDIC Contracts for Major Works*, „Construction Law Journal", London, 2005, p. 4.

[24] See also Georgian Davidoiu, *Răspundere contractuală. Contract de achiziție publică. Obligațiile achizitorului. Refuz nejustificat de executare/Contractual liability. Public procurement contract. Purchaser's obligations. Unjustified denial of performance*, „Revista română de jurisprudență" (Universul Juridic) no. 2/2020, p. 35.

[25] *Idem*. See also Gabriel Manu, *Aspecte privind valabilitatea actelor administrative de urbanism în perioada stării de urgență*, „Universul Juridic" no. 5/2020.

[26] Ibid.

dollars[27].

3. If no solution is reached, mediation is used;

4. The last resort shall be arbitration by an arbitration tribunal or a national court, depending on the agreement of the parties at the time of the conclusion of the contract.

In conclusion, as expressed in the doctrine[28], FIDIC contractual formulas have emerged as formal customs in international contracting in the field of construction, to later become "normative customs, having the value of law"[29] but also sources of law or at least inspirational for the normative process of the states, including for the Romanian legislator for the national contracts in the matter. Beyond the guidance it offers in the contracting process, FIDIC standards also offer solutions to practical problems encountered in the contracting process.

Also, each new edition of the FIDIC contracts has brought improvements consisting of more explicit and detailed procedures[30]. Of course, this also meant busier contracts, but even so, they represented a welcome evolution, resulting from the adaptation to the problems identified in practice or from the application in countries with different legal systems. This evolution has often allowed a quick and objective resolution of disputes.

Last but not least, FIDIC standards are the subject of complex training courses, designed to make them easy to understand and use by practitioners[31].

It can be stated that the source of modern FIDICs is bilateral investment treaties is Bilateral Investment Treaties. For this reason, FIDICs is preferred by the main financial institution[32].

Protections can be found for such contractors and investors in the form of investment treaties concluded between states for the purpose of promoting and protecting foreign investment and the fact that these protections are relevant to the construction sector is reflected in the current share of international arbitration cases in construction disputes (according to statistics, approximately 10% of ICSID cases, this number being increasing).

In the field of construction, there has been some debate as to whether a contract to build something in a host state can be legitimately considered an investment and the jurisprudence has established that at least where the construction project involves the contribution by contractor of large sums, knowledge and staff for a significant period of time, this will often be enough to constitute an investment in the host state, reasons for the arbitral tribunals finding that the following construction projects were an investment: dredging a canal; construction of a highway; construction of bridges; building an airport; building and launching satellites; building a golf course; construction of power plants powered by renewable sources; construction and operation of blood plasma fractionation

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[27] Nael G. Bunni, *op. cit.*, 2005, p. 608.

[28] Oana Ruxandra Gherghina, *Contractul de antrepriză de lucrări de construcții FIDIC, Rezumat teză de doctorat*, p. 44, https://www.utm.ro/wp-content/uploads/2019/11/REZUMAT-ROMANA-1.pdf., consulted on 1.09.2020.

[29] Ibid.

[30] Christopher R. Seppälä, *op. cit.*, 2005, p. 22.

[31] Toby Shnookal, Donald Charrett, *op. cit.*, 2010, p.29.

[32] FIDIC has granted the World Bank a non-exclusive license to cover the six major FIDIC contracts (see list in the notes below) for the projects it finances and the documents will be used as part of the standard document bank tender, and the World Bank's movement is a major supporter of these contracts.

facilities; road construction; building infrastructure and services for the exploitation of gold and copper mines; construction of a hazardous waste landfill; building a hotel; building a self-sufficient satellite city and building real estate development.

3. National contracts

The formal motivation for the publication of Decision no. 1/2018[33] is found in the Substantiation Note which specifies that it is the result, on the one hand, of the actions agreed in Chapter 4 of the National Strategy in the field of public procurement[34] approved by Government Decision no. 901/2015.

On the other hand, in Law no. 80/2017[35], it is established, at point 2, the completion of Law no. 98/2016 on public procurement in the sense that it will be provided by government decision "general and specific contractual conditions for certain categories of public procurement contracts related to investment objectives financed from public funds."

The practical motivation for the emergence of the Government Decision no. 1/2018 is derived from the numerous issues raised by the issuance of Order no. 600 of May 30, 2017 for the amendment of annex no. 1 to the Order of the Minister of Transport and Infrastructure no. 146/2011[36] on the approval of special contractual conditions of contracts for equipment and construction, including design, and of contracts for construction of buildings and engineering works designed by the beneficiary of the International Federation of Consulting Engineers in the Field of Construction (FIDIC), for investment objectives in the field road transport infrastructure of national interest, financed from public funds.

Thus, following the numerous theoretical and practical discrepancies of the representatives of the builders, of the financiers, of the European Commission, of the European Investment Bank (as financier of the projects) and, following the debates and consultations with the stakeholders, the Government Decision was adopted. no. 1/2018 which refers to two annexes[37] that include general and specific conditions for certain categories of procurement contracts related to investment objectives financed from public funds.

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[33] Decision no. 1/2018 of January 10, 2018 for the approval of the general and specific conditions for certain categories of procurement contracts related to investment objectives financed from public funds.

[34] Developed, negotiated, finalized and approved by the representatives of the designated national institutions (MFE, MFP, ANRMAP, UCVAP, MDRAP, CNSC, Chancellery PM) together with the European Commission (DG REGIO and DG GROW).

[35] Law no. 80/2017 for the approval of the Government Emergency Ordinance no. 80/2016 regarding the establishment of some measures in the field of central public administration, for the extension of the term provided in art. 136 of Law no. 304/2004 regarding the judicial organization and for the modification and completion of some normative acts.

[36] Order of the Minister of Transport and Infrastructure no. 146/2011 on the approval of special contractual conditions of contracts for equipment and construction, including design, and of contracts for construction of buildings and engineering works designed by the beneficiary of the International Federation of Consulting Engineers in the Field of Construction (FIDIC), for investment objectives in the field road transport infrastructure of national interest, financed from public funds.

[37] General and specific conditions and contractual agreement for works execution contracts from 10.01.2018, respectively General and specific conditions and contractual agreement for design and execution contracts from 10.01.2018.

Basically, these two annexes each contain a form of national contract corresponding to the famous Red and Yellow Contract Conditions from the FIDIC panoply.

According to some of the initiators[38], the national contract, although it started from FIDIC standards, was intended not to be FIDIC and, among other conditions and amendments, arbitration should be done in national courts, while having elements to adapt to national law. The arbitration carried out by the International Court of Arbitration at the Romanian Chamber of Commerce and Industry was chosen, a compromise between the Romanian administrative court and international arbitration (Paris Arbitration Court) resulting from the difficulties accused by the entrepreneurs as a result of the fact that the decisions of administrative contentious judges are not adapted to the complexity of public investment contracts.

It should be mentioned that the VOB[39] contracts and the contracts used by the European Commission for the projects directly financed by it served as inspiration, which, in turn, used as inspiration the contracts used by Great Britain, respectively New Engineering Contract (NEC)/New Engineering and Construction Contract[40].

At the same time, these two contract models proposed in GD1/2018 represent a form of administrative contract as the beneficiary, respectively the administrative authorities have the right to supervise and control as well as the right to unilaterally modify the contract in exceptional situations[41] (with the granting of adequate and effective compensation) and the right to sanction.

At the same time, they are seen as accession contracts because, according to the clauses contained, they would be accepted as such and without changes or amendments from entrepreneurs[42].

Last but not least, these standard contracts must be used for works contracts financed from public funds, non-reimbursable and/or reimbursable funds, the total estimated value of which is at least equal to the threshold for the publication of a notice in the OJEU (23,227,215 lei)[43], respectively both for public procurement of works regulated by Law no. 98/2017[44] as well as for the sectorial acquisitions of works regulated by Law no. 99/2017.

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[38] The conference organized by ARIC and ARACO in Bucharest, 07.06.2018, about the importance of project preparation, https://soundcloud.com/asocia-ia-pro-infrastructur/despre-fidic-si-noul-model-de-contract-national, consulted on 1.09.2020.

[39] https://www.vob-online.net/en: German construction contract procedures (*Vergabe - und Vertragsordnung für Bauleistungen (VOB*)) are standardized forms of contract used in public procurement procedures in Germany. They are also used for private construction projects. They are issued by the German Institute for Standardization (DIN) on behalf of the German Committee for Contractual Construction Procedures (DVA).

[40] Is a standardized system developed by the Institution of Civil Engineers in Great Britain that guides the drafting of documents on construction projects as well as civil engineering. The NEC contract system is mainly used in the United Kingdom, New Zealand, Australia, Hong Kong and South Africa but has also become a source of inspiration for other contract models.

[41] Clause 66.7. The Beneficiary, at any time and with immediate effect, may unilaterally terminate the Contract, by a notice to this effect sent to the Contractor.

[42] Daniel Moreanu, https://www.economica.net/contractul-national--noua-biblie-a-infrastructurii--ce-se-schimba-si-cum-va-fi-afectata-constructia-de-autostrazi-in-romania_149050.html, consulted on 1.09.2020.

[43] Grounding Note - GD no.1 / 10.01.2018.

[44] Art. 7 para. (1) letter a) of the Law no. 98/2016.

As the main specific elements implemented by Government Decision no. 1/2018 includes the following:

a) Beneficiaries may draw up Special Conditions only in respect of the sub-clauses and only in relation to the subjects listed in the table at the end of the model contract[45]. Any other Special Condition is void. As a result, the beneficiary can no longer make his own changes to the contracts. At the same time, contractors will be obliged to accept it in the form proposed by the beneficiary, without being able to propose amendments, as in the case of FIDIC type contracts. At the same time, they have to try to remedy any mistake from the beginning, in the case of the Contract for the design and execution of works, according to Clause 8.4.: Within 90 days from the Start Date (unless another term is provided in the Contractual Agreement), the Contractor shall notify the Supervisor of any error, mistake or other discrepancy identified in the Beneficiary's Requirements or in these benchmarks or reference systems.

b) The language of the Contract and of all communications between the Contractor, the Beneficiary and the Supervisor or their representatives shall be Romanian, unless otherwise provided in the Contractual Agreement[46]. The contract will be governed by Romanian law[47].

c) The feasibility study becomes optional. Thus, for works design and execution contracts, according to Clause 8 The Beneficiary's requirements are contained in the document prepared by the Beneficiary which presents the essential requirements related to the works and which includes, among others, the feasibility study for information.

d) The engineer as a specific element of FIDIC formulas is replaced by a supervisor[48]. According to the entrusted attributions, it acquires a central role in terms of the technical execution of the project, as well as a linking role in the communications between the Contractor and the Beneficiary[49].

e) The entry into force of the national contracts is limited to the provisions of the Emergency Ordinance no. 80/2016[50] which provides that on the date of entry into force of the Government decision provided in art. 235 para. (4)[51] of Law no. 98/2016 on

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[45] Diana Antofie, https://www.digi24.ro/stiri/economie/companii/contract-standard-pentru-toate-lucrarile-de-peste-cinci-milioane-euro-871622, consulted on 1.09.2020.

[46] Clause 2 Language of the Contract. 2.1. The language of the Contract and of all communications between the Contractor, the Beneficiary and the Supervisor or their representatives shall be Romanian, unless otherwise provided in the Contractual Agreement.

[47] Clause 71. Law. 71.1. Unless otherwise provided in the Contractual Agreement, the Contract shall be governed by Romanian law.

[48] The general and specific conditions and the contractual agreement for the works execution contracts from 10.01.2018, Clause 1. Definitions, art. 1.1, letter ccc) Supervisor - economic operator or team within the Beneficiary, designated by the Beneficiary. The supervisor has the technical, financial and contractual attributions established in the Contractual Conditions. The Supervisor is nominated in the Contractual Agreement or notified to the Contractor in accordance with the provisions of clause 5 [Supervisor and Supervisor's representative]. The supervisor has in his team authorized site supervisors, according to the provisions of the Law, and any other persons for the fulfillment of his role.

[49] General and specific conditions and contractual agreement for works contracts of 10.01.2018, Clause 8.

[50] Art. X of the Emergency Ordinance no. 80/2016 for establishing measures in the field of central public administration, for the extension of the term provided in art. 136 of the Law no. 304/2004 regarding the judicial organization and for the modification and completion of some normative acts.

[51] Law no. 98/2016, article 235 para. (4) *The decision of the Government shall establish the general and specific contractual conditions for certain categories of public procurement contracts related to the investment objectives financed from public funds.*

public procurement, with the additions brought by this emergency ordinance, abrogates the Government Decision no. 1405/2010 on the approval of the use of contractual conditions of the International Federation of Consulting Engineers in the Field of Construction (FIDIC) for investment objectives in the field of transport infrastructure of national interest, financed from public funds.

f) Deadlines and sanctions have been established in the form of revocation of rights for obligations that are not fulfilled in time or adequately by the parties. We list by way of example: Clause 5.3. letter b), 7.4., 12.4., 17.4., etc.

g) Disputes and arbitration shall be conducted in accordance with a well-established procedure, with an emphasis on amicable settlement directly or through a mediator, but not earlier than 90 days from the date of the Supervisor's Decision and before the above-mentioned arbitration is reached and which will be achieved, as I mentioned, through the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania[52]. At the same time, the Arbitration may start within 90 days from the conclusion of the mediation or direct negotiation procedure.

h) The lost profit that can be invoked by the contractors by claim was limited to 2% of the additional costs requested[53]. In turn, the additional costs (Clause 55) will have to be very well substantiated and clearly highlighted.

4. Conclusion

The conclusion that emerges from the analysis, albeit brief, of the existing standardized forms of contract is that the legislative unpredictability manifested in the entire legal spectrum in general and the above-mentioned field, especially, deeply affects the business environment but also the evolution and completion of national infrastructure projects.

We consider that there was no need for national standardized contracts as long as they effectively and pertinently applied international standards that had specific forms and formulas for any kind of operations. The defective performance of a contract or its non-finalization does not depend on its form, be it FIDIC, national contract or a trivial Romanian works contract, but rather on the institutional incapacity or seriousness of the parties and lack of their good faith. The numerous and extremely high value claims are due rather to violations of the contractual provisions, not to their defective form that has been negotiated/adopted by the parties[54].

Last but not least:

- the contractual clauses that violate a legal provision are null and void, the rest of the clauses representing the law of the parties;

- employees of the Regional Directorates of Roads and Bridges within CNAIR who are also FIDIC engineers, we consider that they are incompatible. We do not believe

[52] Clause 70. Disputes and arbitration.

[53] 68.2. Consequences of the Beneficiary's Risks.

[54] See, for example, the Pizzarotti case: https://monitorizari.hotnews.ro/stiri-infrastructura_articole-19324096-povestea-celei-mai-controversate-bucati-autostrada-din-romania-cum-ajuns-lucrarile-ciotul-din-autostrada-a3-care-intra-bucuresti-fie-blocate-neterminate-doi-ani-jumatate-deschiderea-circulatiei.htm, consulted on 1.09.2020.

that it is feasible and equidistant and even correct for the beneficiary to be a FIDIC engineer, even if there is no specific incompatibility provided in the contract. The FIDIC engineer or the supervisor of national contracts must be independent and impartial and act in good faith[55].

- in all cases, the existence of a contract for supervision of the main contract is imperative.

- in these situations, FIDIC becomes the practical tool by which the foreign investor that is not a party to an international investment treaty, as it is known, has the possibility to use as a basis for its investments a commercial contract in which the standard clauses reflect the protection standards. and treatment conferred by an investment treaty.

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[55] From the FIDIC perspective, good faith is regulated differently, depending on the specific national legislation and the systems of law, respectively common law and civil law.